No. 90-1889

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

JOSEPH FLUENT, Individually and as a representative of the Class of Salamanca Lessees holding 99-year leases from Seneca Nation of Indians; JAMES V. MONGILLO, Individually and as a representative of the class of Salamanca lessees holding 50-year leases from the Seneca Nation of Indians and KEITH MCCLAIN, Individually and as a representative of the class of congressional village lessees holding 99-year leases from the Seneca Nation of Indians; ROBERT ADAMIC, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; MARILYN ADAMIC, Individually and on behalf of the class of lessees who signed the "40/40 Lease" Tendered by the Seneca Nation of Indians on or about September 4, 1990; SALAMANCA COALITION OF UNITED TAXPAYERS, INC., Individually and on behalf of its membership,

Petitioners,

vs.

SALAMANCA INDIAN LEASE AUTHORITY; DAVID FRANZ, Individually and as Attorney for the City of Salamanca Indian Lease Authority; ANTONIO CARBONE, Individually and as Mayor of the

Respondents.

(Additional Respondents continued inside Front Cover.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI

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(Additional Respondents.)

City of Salamanca and also as member of the Salamanca Indian Lease Authority; CITY OF SALAMANCA; PATRICK CALLAGHAN, Individually and as Chairman of the Salamanca Indian Lease Authority; LINDA RYCHCIK, Individually and as member of the Salamanca Indian Lease Authority; HENRY STEFANSKI, Individually and as a member of the Salamanca Indian Lease Authority; OWEN K. PHILLIPS, Individually and as a member of the Salamanca Indian Lease Authority; DANN COLVIN, Individually and as a member of the Salamanca Indian Lease Authority; PAUL TAYLOR; PENNY BUCKLEY; SENECA NATION OF INDIANS,

Respondents.

QUESTIONS PRESENTED

1. Does the Doctrine of Indian Sovereign Immunity bar non-Indians from obtaining judicial review and construction of federal statutes that affect their constitutional, statutory and contractual rights?

2. Do the joinder requirements of Rule 19 of the Federal Rules of Civil Procedure effectively immunize federal Indian statutes from judicial review, unless review is sought by Indians?

3. Did the lower courts err by refusing to consider legislative history to determine whether Congress intended to waive Indian Sovereign Immunity by legislation passed in 1875 and 1890?

4. Did the lower courts misconstrue the Acts of 1875 and 1890?

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 29.1, all parties to the proceeding are listed in the caption.

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No. _____

JOSEPH FLUENT, *et al.*,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 928 F.2d 542 (CA 2 1991) and is reproduced in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter "Appendix" or "App.") at pages 1a-14a. The decision of the United States District Court for the Western District of New York which was the subject of the proceedings in the Court of Appeals is unpublished and is reproduced in the Appendix (App. at 49a-65a). An additional decision of the District Court which was not the subject of the appeal to the Court of Appeals is also reproduced in the Appendix (App. at 25a-42a).

JURISDICTION

The opinion of the Court of Appeals for the Second Circuit was announced on March 15, 1991; it became final upon issuance of that Court's Mandate on April 5, 1991. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

I. Constitutional Provisions:
- —U.S. Const. Art. I, §8 ..... App. at 598a
- —U.S. Const. Art. VI ..... App. at 598a
- —U.S. Const. Amend. V ..... App. at 598a
- —U.S. Const. Amend. XIV ..... App. at 599a

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- —"Act of February 19, 1875" ..... App. at 118a
- —"Act of September 30, 1890" ..... App. at 123a
- —"Act of August 15, 1950" ..... App. at 124a
- —"Salamanca Settlement Act of 1990" . App. at 128a
- —12 U.S.C. §1709(q) ..... App. at 599a
- —Fed. R. Civ. P. 19 ..... App. at 600a
- —24 CFR Ch. 11, §203.43j ..... App. at 602a

III. New York Statutes:
- —N.Y. Pub. Auth. Law, Art. 8 ..... App. at 141a
- —N.Y. Indian Law, §46 ..... App. at 601a

STATEMENT OF THE CASE

Two Acts of Congress create the landlord-tenant relationship between the petitioner lessees ("Lessees") and their landlord, respondent Seneca Nation of Indians ("Seneca Nation"): the Act of February 19, 1875, ch. 90, 18 stat. 330 ("Act of 1875") App. at 118a-122a; and the Act of September 30, 1890, ch. 1132, 26 stat. 558 ("Act of 1890"). App. at 123a. For more than a century lessees have occupied homes and businesses on 3,300 acres of the Seneca Nation's Allegany Reservation pursuant to individual leases authorized by the Acts of 1875 and 1890. The lessees include several distinct classes:

(A) Lessees in the City of Salamanca, New York ("City") who occupy their property pursuant to 99-year leases originally granted by the Seneca Nation in 1892 and which expired on February 19, 1991. App. at 452a-454a. These 99-year leases include leases offered to some lessees by the Seneca Nation following the Second Circuit's 1942 decision in *U.S. v. Forness,* 125 F.2d 928 (CA2 1942), *cert. den. sub. nom. City of Salamanca v. United States,* 316 U.S. 694 (1942). App. at 455a-464a.

(B) Lessees who occupy their property pursuant to 50-year leases which the Seneca Nation issued in or around the late 1980's. App. at 465a-473a.[1]

(C) Lessees who reside outside the City in the villages of Carrollton, Great Valley, Allegany and Vandalia, referred to hereinafter collectively as the "Congressional Villages." Virtually all lessees in the Congressional Villages hold 99-year leases identical to the City leases.

[1] These lessees held 99-year leases but were unable to obtain home mortgages, equity loans, business loans, etc., because banks refused to loan on collateral subject to expiring 99-year leases. To obtain mortgages etc., some 99-year lessees accepted 50-year leases offered by the Nation. There were no negotiations for the terms and conditions of the 50-year leases. Petitioners allege that the 50-year lessees are also 99-year lessees because the 99-year leases originally covering their property were never discharged or cancelled of record and the 50-year leases were not authorized by federal law nor negotiated as required by the Acts of 1875 and 1890.

(D) Lessees who signed a new lease offered in September, 1990 by the Seneca Nation. App. at 486a-516a. This new lease contemplates a 40-year term with a possible 40-year renewal. Thus, it is referred to as the "40/40 Lease."

(E) A group of lessees (including City, Congressional Village, 99-year, 50-year and 40/40 lessees) known as the Salamanca Coalition of United Taxpayers, Inc. ("SCOUT"). When the complaint herein was filed on November 30, 1990, SCOUT had approximately 600 members. Today, SCOUT's membership exceeds 900 persons. Each member typically represents a spouse and children or other family members. SCOUT is incorporated under New York state law and is itself a lessee of City land subject to a 99-year lease.

Each leased parcel is subject to a separate lease between each individual lessee (or lessee's predecessor) and the Seneca Nation. It is estimated by the Seneca Nation that there are approximately 3,300 lessees. Of that number, approximately 200 are Congressional Village Lessees, 150 are 50-year lessees and the balance are 99-year City lessees. Some of the foregoing have, since this action was commenced, become 40/40 lessees by signing the 40/40 lease.[2]

[2] The District Court granted the Seneca Nation's Motion to Dismiss on January 25, 1991. On January 29, 1991 the District Court granted Petitioners' Rule 54(b) Motion and a final judgment was entered dismissing the Seneca Nation as a party and dismissing counts 1, 8 and 10 of the Complaint pursuant to Fed. R. Civ. P. 19(b). On February 5, 1991 Petitioners' Motion to Expedite the Appeal was granted and Petitioners were directed by the Court to serve and file their Brief on Appeal, Joint Appendix and Record on Appeal by noon, February 11, 1991. After filing on that date, Petitioners filed a motion for an injunction to maintain the status quo while the appeal was *sub judice*. Oral argument on the appeal was scheduled for February 19, 1991 (the day the leases were to expire) and the motion for a status quo order was returnable on that day. At the close of oral argument on February 19, 1991, the Court of Appeals reserved decision on the appeal and granted Petitioners' motion for an injunction to maintain

(Footnote continued on following page.)

The Act of 1875 created the landlord/tenant relationship between lessees and the Seneca Nation, conferring certain obligations and benefits on each party:

> Section 3. That all leases of land situate within the limits of said villages when established as hereinbefore provided, *** shall be valid and binding upon the parties thereto, and upon said Seneca Nation for a period of five years from and after the passage of this act, except such as by their terms may expire at an earlier date; and at the end of said period, or at the expiration of such leases as terminate within that time, said nation through its counselors shall be entitled to the possession of the said lands, and shall have the power to lease the same: *Provided, however, that at the expiration of said period, or the termination of said leases, as hereinbefore provided, said leases shall be renewable for periods not exceeding 12 years, and the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in*

(Footnote continued from preceding page.)

the status quo. The Second Circuit's decision affirming the District Court was issued on March 15, 1991. *Fluent v. Salamanca Indian Lease Authority,* 928 F.2d 542 (CA 2 1991). That decision ordered the status quo injunction rescinded. On March 28, 1991 Petitioners filed a motion with the Second Circuit to stay the issuance of the Court's mandate to permit Petitioners to file their petition for a writ of certiorari with this Court. The Second Circuit denied Petitioners' stay motion on April 5, 1991 and the mandate of the Second Circuit issued on that date. By application to this Court filed on April 15, 1991, the Petitioners requested the Circuit Justice for the Second Circuit to recall and stay the mandate of the Second Circuit. Upon denial, petitioners renewed the Application to Justice Stevens who referred it to the full Court. On April 29, 1991, the Court denied Petitioners' Application. April 29th was the last day for lessees to accept the 40/40 lease from the Seneca Nation. Upon denial of the application to recall and stay the Second Circuit mandate, several hundred lessees went to the designated location to sign a 40/40 lease with the Seneca Nation. SCOUT has obtained the signatures of approximately 800 lessees indicating that their signatures on the 40/40 lease were under protest. An estimated 20% of the lessees have refused to sign the 40/40 lease and now have no lease at all.

possession of such lands, on such conditions as may be agreed upon by him or them and such counselors; and in case they cannot agree upon the conditions of such leases, or the amount of annual rents to be paid, then the said counselors shall appoint one person and the other party or parties shall choose one person, as referees to fix and determine the terms of said lease and the amount of annual rent to be paid; and if the two so appointed and chosen cannot agree, they shall choose a third person to act with them, the award of whom, or the major part of whom, shall be final and binding upon the parties; and *the person or persons owning said improvements shall be entitled to a lease of said land and to occupy and improve the same according to the terms of said award,* he or they paying rent and otherwise complying with the said lease or said award; *and whenever any lease shall expire after its renewal as aforesaid, it may, at the option of the lessee, his heirs or assigns, be renewed in the manner hereinbefore provided.*

* * *

Section 7. That the courts of the State of New York within and for the County of Cattaraugus, having jurisdiction in real actions, *and the circuit and district courts of the United States in and for the Northern District* [*now Western District*] *of said state, shall have jurisdiction* of all actions for the recovery of rents and *for the recovery of possession of any real property within the limits of said villages,* whether actions of debt, ejectment, *or other forms of action,* according to the practice in said court; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions. App. at 119a-122a (emphasis added).

* * *

Subsequent to the Act of 1875, the Act of 1890 was passed; it extended the term of the leases and renewals authorized by the Act of 1875 from 12 years to 99 years.

It expressly did not amend the Act of 1875 in any other respect. App. at 123a.

Each 99-year lease expressly provides for a renewal term up to 99 years upon expiration on February 19, 1991. Each lease further provides that the renewal is pursuant to the Acts of 1875 and 1890 which provide that the rent and conditions of the renewal period will be derived by negotiation or, if negotiations fail, arbitration.

The District Court for the Western District of New York and the Court of Appeals for the Second Circuit concluded that no federal forum may adjudicate the rights and responsibilities created and conferred by the Acts of 1875 and 1890, and by the leases granted thereunder, unless the Seneca Nation seeks such adjudication.[3] Lessees' Count One, sought to declare the meaning of the Acts and other equitable relief; it was dismissed on the basis of Indian sovereign immunity.

Also dismissed were two claims asserted by lessees against Respondents other than the Seneca Nation. Count Eight sought a declaration that an Agreement between the City and the Nation, executed in July, 1990, is invalid and void. Count Ten alleged that a new statute which purports to "implement" that Agreement is unconstitutional. Seneca Nation Settlement Act of 1990, Pub. L. 101-503, 104 Stat. 1292 ("Settlement Act of 1990"). App. at 128a-140a. That statute was signed by President Bush on November 3, 1990. Lessees have alleged numerous constitutional defects with the Settlement Act of 1990. *See,* App. at 45a-46a.

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[3] The Nation has frequently availed itself of the federal courts to enforce its statutory and contractual rights against lessees. *See e.g., Forness, supra,* 125 F.2d 928. No other court has jurisdiction over these claims. New York State courts are incompetent to adjudicate Indian land claims, *see, e.g., New York Indians,* 5 Wall. (72 U.S.) 761 (1866). *See also,* Indians, 25 U.S.C. §233 (1983). The Seneca Nation's Peacekeeper Courts do not have jurisdiction over disputes between Indians and non-Indians. New York Indian Law, §46 (McKinney's 1991 Supp.).

The early history of the leasing at issue and a brief statement of recent events are set forth below.

A. Historical Framework

Title to the Allegany Reservation traces back to the "discovery doctrine" whereby the European country "discovering" land in the "New World" asserted a claim to possession of that territory as against other European countries. *See, Johnson v. McIntosh*, 8 U.S. (Wheat.) 543 (1823). The European countries agreed that their claims were subject to a right of occupancy by the native people in the discovered territory.

Pre-emptive rights arise from the "discovery doctrine." *See e.g. Johnson, supra*, 8, U.S. at 571-604 and *Worcester v. Georgia*, 31 U.S. (Pet.) 515, 543-461 (1832) *See also, Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-668 (1974) and *Fellows v. Blacksmith*, 60 U.S. 366 (1857). The right of pre-emption is the right to extinguish the Native Americans' right of occupancy.

The pre-emptive rights to the Allegany Reservation are in a private grantee, the Ogden Land Company.[4] Neither the Seneca Nation nor the United States holds title to

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[4] The Allegany Reservation Land was conveyed by Massachusetts to Robert Morris by Deed dated May 11, 1791. Two subsequent transactions conveyed the Allegany Reservation Lands from Robert Morris to grantees commonly referred to as the Holland Land Company. By treaty between the Seneca Nation and Robert Morris dated September 15, 1797, the Indians surrendered large tracts of land, excepting Reservations including the Allegany Reservation. App. at 83a-91a. By Deed dated September 12, 1810 the Holland Land Company granted a Deed to David A. Ogden for land including the Allegany Reservation. David Ogden then conveyed, by Deed dated February 8, 1821, the Allegany Lands to the trustees of what is known as the Ogden Land Company. This brief summary of title is taken from an abstract of title prepared by Victor H. Samuelson, Historian/Abstractor, Bradford, Pa. Mr. Samuelson, aged 93 years,

(Footnote continued on following page.)

the Allegany Reservation on which the City and the Congressional Villages are built. The Seneca Nation has only the Indian right of occupancy.

The leasing at issue began when the railroads crossed the Reservation and formed a junction at what was to become the City of Salamanca. Leases were granted to the railroads and so-called "white-settlers" by the Nation and by individual Indians. In the early 1870's those leases were declared void. App. at 309a-310a. *See also, Forness, supra*, 125 F.2d at 930-31 and n. 1. The leases were held to violate the federal Non-Intercourse Act. Congress was petitioned to remedy that situation. App. at 302a-303a, 309a-310a. The remedy was the Act of 1875 as amended by the Act of 1890.[5] The 99-year leases at issue were all granted pursuant to those Acts, beginning in 1892. They all expired on February 19, 1991.

B. Recent Developments

In 1987, the respondent Salamanca Indian Lease Authority ("SILA") obtained authorizations from individual lessees authorizing SILA "... to negotiate

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has researched title to the Allegany and Cattaraugus Reservations since he returned from World War I in the early 1900's. Mr. Samuelson has followed the case at bar with great interest.

By the Buffalo Creek Treaty of 1838 (App. at 91a-106a) the Seneca Nation transferred its right of occupancy in four reservations, including the Allegany Reservation, to Ogden for $202,000. A tremendous outcry followed the Treaty. Quakers residing in the region (who were advised by Daniel Webster) and settlers in what was to become the City of Salamanca supported the Seneca Nation's protest to the Buffalo Creek Treaty of 1838. The Buffalo Creek Treaty of 1842 followed. App. at 107a-117a. By that Treaty, Ogden gave back the right of occupancy to the Allegany and Cattaraugus Reservations, retaining unencumbered title to the Buffalo Creek and Tonawanda Reservations. The Ogden Land Company still retains the right of preemption to the Cattaraugus and Allegany reservations.

[5] For a more thorough description of the historical background, *see* Letter from John R. T. Reeves dated December 26, 1914, contained in H. Doc. 1590, 63rd Congress, 3d. Sess. App. at 262a-293a.

with the Seneca Nation . . . for the terms and provisions of a renewal" of the existing leases.[6] The authorization form used provided: ". . . [T]hat the *Salamanca Indian Lease Authority shall have no authority to execute or accept such a renewal lease for (me) (us)* without (my) (our) specific written authority." App. at 547a-548a. (emphasis added).[7] The Congressional Village lessees *never* authorized SILA or any other body to negotiate on their behalf.

From approximately 1988 through the summer of 1990, SILA and the Seneca Nation negotiated the terms and conditions of two agreements and the 40/40 lease. In July, 1990 the City and the Seneca Nation executed the agreements. The first agreement ("Agreement") provided that the Nation would offer a 40-year lease to the lessees with a purported right to a 40-year renewal. App. at 517a-535a. The Agreement also stated a formula

[6] SILA was created by New York Public Authorities Law, Article 8, Sections 1790-1799 (McKinneys 1981). App. at 141a-151a. Petitioners allege that the State of New York was incompetent to create SILA because New York is incompetent to legislate in matters affecting Indian lands. Nonetheless, whatever defect in SILA's authority existed from New York's want of authority in this matter, was rendered moot upon SILA obtaining written authority from the majority of city lessees. SILA itself represented on many occasions that after 1987 it did not operate pursuant to the New York Public Authorities Law.

[7] After lessees received the 40/40 lease in September, 1990, many cancelled SILA's authority, in writing, as permitted by the authorization form. App. at 549a. In response, SILA purported to reject the 40/40 Lease on behalf of those lessees. App. at 550a-552a. SILA's action was obviously in retaliation against those lessees who believed SILA had abused its authority. The District Court found that SILA's conduct was inexplicable and unauthorized since SILA *never* had authority to accept or reject a lease for any lessee. App. at 27a-28a, 34a. Inexplicably, the Second Circuit ignored this factual determination and stated that SILA had in fact *agreed* to the 40/40 lease, apparently on behalf of the lessees, thereby satisfying the requirements of the statutes and leases. App. at 11a. Numerous claims against SILA and its members are still pending in the District Court. That Court determined that those claims present ". . . sufficiently serious questions going to the merits to make them a fair question for litigation." App. at 39a.

for calculating rent due and owing to the Nation and other terms and conditions applicable to the leasehold interest.

Attached to the Agreement was the second agreement negotiated by SILA and signed by the City known as the Joint Leasing Commission Agreement ("Commission Agreement"). It purports to create a Commission comprised of members of the Seneca Nation and appointed representatives from the City. App. at 536a-546a. That Commission is vested with authority to supervise various lease-related matters including the collection and assessment of rent (which is actually assessed as a tax) and procedures to arbitrate disputes arising under the Agreement and the leases.

Lessees allege that many provisions in the 40/40 lease, the Agreement and the Commission Agreement violate state and federal law.[8] By dismissal of Lessees' Count Eight, the Courts are foreclosed from adjudicating the validity of those documents.

[8] For example, the 40/40 lease and the Commission Agreement provide that lessees may arbitrate disputes with the Seneca Nation. Lessees may appeal the Arbitrators' decision to the United States District Court for the Western District of New York. App. at 543a-546a. Indisputably, only Congress can create federal court jurisdiction. No Act of Congress created the alleged appeal jurisdiction in the Western District of New York. The only jurisdictional provision in the Settlement Act of 1990 is at section 9. That expressly creates exclusive jurisdiction in the Western District over constitutional challenges to the Act of 1990. That express grant of jurisdiction has been refused by the Federal Courts herein. Additionally, none of the Agreements nor the Settlement Act of 1990, purport to waive the Nations' sovereignty in connection with this fictional appeal to the District Court. Congress recently responded to this concern by including in a committee report, accompanying the appropriations bill necessary to appropriate $35 million owing pursuant to the Settlement Act of 1990, declarations of Congressional intent that the federal expenditure is dependent upon submission of arbitration appeals to the federal district court. Congress clearly intends that to sufficiently state its intent to subject the Seneca Nation to federal court jurisdiction. The decisions below, however,

(Footnote continued on following page.)

The Settlement Act of 1990 purports to adjust "past inequities" arising from nominal rents paid to the Seneca Nation pursuant to the leases authorized by the Acts of 1875 and 1890. It was enacted, in part, to "facilitate the negotiations of new leases." Settlement Act of 1990, §§2(b)(1), 2(b)(3). App. at 130a-131a.[9] By dismissal of

(Footnote continued from preceding page.)
create precedent that such legislative history is *insufficient* to constitute a clear waiver of the Nation's sovereign immunity. *See infra* at Point C. The Nation reserves all "rights, powers and remedies now or hereafter existing at law or in equity or by statute or otherwise." 40/40 Lease, §24, App. at 510a-511a. This and other provisions in the lease which provide for a direct remedy by the Nation against a lessee upon non-payment of rent or other default (App. at 507a-511a) are directly contrary to an Act of Congress passed in 1950, Public Law 690, Ch. 707 (1950). App. at 124a-127a. That statute provides that only the City may foreclose against defaulting lessees. Pursuant to paragraphs 11 and 12 of the 40/40 lease (App. at 497a), the Seneca Nation becomes, *de facto*, the zoning board for the City of Salamanca. Petitioners allege that this is contrary to New York State law and that the City may not, by agreement, delegate its governmental functions over land use and zoning to the Seneca Nation. Paragraphs 13, 14 and 15 of the 40/40 lease contain various provisions by which the Nation exempts itself from liability which arises by law from ownership of land. App. at 498a-500a. Particularly, paragraph 15 purports to exempt the Nation from liability for hazardous waste found on its property. Paragraph 17 of the 40/40 lease, and other provisions, give the Seneca Nation a dominant role in the assessment and collection of the rental payment which, pursuant to New York State and City law, is assessed as a tax. App. at 500a. *See also*, Commission Agreement, §D (App. at 538a-540a) and Agreement, §IV (App. at 524a-526a). Petitioners contend that it is a violation of New York State law for the City to delegate its taxing authority to the Seneca Nation by agreement. Additionally, Petitioners contend that this provision is a further violation of the Act of 1950 which governs collection of the Indian rent.

[9] It does not require the lessees to accept the 40/40 lease. The Act of 1990 clearly declares that the State of New York and the United States have no authority over lease negotiations between lessees and the Seneca Nation. Settlement Act of 1990. §§5(c)(d). App. at 135a. Lessees demanded that the Nation renew and negotiate or arbitrate

(Footnote continued on following page.)

Count 10, the courts are precluded from adjudicating the constitutionality of the Settlement Act of 1990.[10]

(Footnote continued from preceding page.)

pursuant to the Acts of 1875 and 1890. App. at 553a-559a. The Nation's response threatened to revoke the offered 40/40 lease from any lessee who insisted on a separate right to negotiate or arbitrate. App. at 560a-566a. Subsequent requests by lessees to negotiate with the Nation (App. at 570a-571a; 576a-577a) were rejected (App. at 572a-575a; 578a-579a). The Nation revoked the 40/40 offer from the named Petitioners even though the Agreement provided that the offer would be kept open through February 19, 1991. App. at 520a. Although the nation subsequently restored the option to accept the 40/40 lease to those Petitioners, its capricious conduct demonstrates how the Nation may, with impunity, breach any and all provisions of the agreements and the leases.

[10] The Settlement Act of 1990 *does not* repeal, by implication or otherwise, the Acts of 1875 and 1890. It does not incorporate by reference, endorse, support, validate, mandate or even discuss the terms and conditions of the 40/40 Lease. In fact, the Settlement Act at §5 expressly provides that the United States and the State of New York may not be involved in negotiations for the terms of the lease and will not serve in any capacity to review or approve such leases.

The Settlement Act of 1990 confers no new or additional power on the Seneca Nation to lease land in Salamanca or the Congressional Villages. Because of the Non-Intercourse Acts, the Seneca Nation must have authorization from Congress to offer the 40/40 lease. The only authority upon which the Seneca Nation may rely to support its tender of the 40/40 Lease to the lessees is the Act of 1875 as amended by the Act of 1890. That is the only statute which clearly confers authority on the Nation to lease lands within the City and Congressional Villages.

REASONS FOR GRANTING THE WRIT

A. The Decisions Below Prohibit The Federal Courts From Interpreting And Determining The Validity of Acts of Congress.

By virtue of the decisions of the District Court and the Court of Appeals, the courts may not declare nor adjudge the meaning or validity of the Acts at issue. The Acts of 1875, 1890 and 1990 clearly affect lessees' property interests; yet, the decisions below bar lessees from obtaining judicial review or construction of those Acts. Absent judicial review, lessees' property interests may be altered or eliminated without any judicial check. Without access to the courts, lessees' due process rights are destroyed along with the doctrine of judicial review.

This Court has never held that Indian sovereign immunity may deprive non-Indians of constitutionally protected property and due process rights. Neither *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978), nor this Court's most recent case on point, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* No. 89-1322 (Feb. 26, 1991) 498 U.S. _____, 111 S. Ct. 905 (1991), held that Indian sovereign immunity divests the federal courts of their necessary jurisdiction to interpret and adjudicate federal statutes and constitutional rights.

Santa Clara Pueblo, involved an Indian litigant who had access to a tribal forum. The dispute did not concern Indian land nor non-Indian claimants. Chief Justice Rehnquist noted that *Santa Clara Pueblo* was distinguished by its intra-tribal character in *Nat. Farmers Union Ins. Co. v. Crow Tribe,* 468 U.S. 1315, 1319 (1984) (Decision of Chief Justice Rehnquist, as Circuit Justice on Application for Stay.) *See also, Nat. Farmers Union Ins. Co. v. Crow Tribe of Indians,* 471 U.S. 845, 852 n.14 (1985).

Potawatomi supports the view that Indian sovereign immunity does not shield Indian Tribes from responsibilities arising from commerce with non-Indians.[11]

Legislative power over Indian affairs is committed exclusively to the U.S. Congress. U.S. Const. Art. 1, §8. Congress has plenary power over Indian matters. *Santa Clara Pueblo, supra*, 436 U.S. at 56. Nevertheless, Indian statutes passed by Congress are necessarily restricted by the United States Constitution, of which the Federal Courts are the final arbiter:

> The cases have described Congress' power over Indian affairs as "plenary." Plenary does not mean "absolute," in the sense that it may be exercised free of constitutional limits or judicial review. It is well settled today, although it may not have been when the term "plenary power" was first utilized, that Congress is subject to constitutional strictures in its dealings with Indians.

Cohen, Handbook of Federal Indian Law (Mitchie Co. 1982 ed.) at 217. *See also, Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84-85 (1977). This is thoroughly consistent with, and indeed required as a necessary corollary of, the doctrine of judicial review announced by Chief Justice John Marshall in *Marbury v. Madison*, 5 U.S. (Cranch) 137 (1813) "If, then, the Courts are to regard the constitution, and the constitution is superior to any ordinary act of the

[11] Justice Stevens, concurring with the majority, observed that the majority decision in *Potawatomi* effectively acknowledged limits on the doctrine of tribal sovereign immunity "although it does not do so explicitly." Justice Stevens stated:

> [T]he Court today recognizes that a tribe's sovereign immunity from actions seeking money damages does not necessarily extend to actions seeking equitable relief. *Potawatomi, supra*, 111 S.Ct. at 913, Stevens, J., concurring.

Similarly, lessees' claims against the Seneca Nation seek prospective injunctive relief only.

legislature, the constitution, and not such ordinary act, must govern the case to which they both apply." *Marbury, supra*, 5 U.S. at 178.

Chief Justice John Marshall, who first most completely announced the doctrine of Indian sovereignty in *Worcester, supra*, 311 U.S. 575, surely never contemplated the result which the Seneca Nation has achieved herein. The decisions below mean that Congress may manipulate legislation to secure immunity from judicial review and that the status of a litigant (Indian Tribe or non-Indian) determines whether a federal court can adjudicate federal statutes.

This result is most conspicuous by the dismissal of Lessees' Count 10 challenging the constitutionality of the Settlement Act of 1990. Congress expressly anticipated the possibility that the Settlement Act of 1990 would be challenged on constitutional grounds. Therefore, it provided at Section 9:

> Notwithstanding any other provision of law, any action to contest the constitutionality or validity under law of this Act shall be barred unless the action is filed on or before the date which is 180 days after the date of enactment of this Act. Exclusive jurisdiction over any such action is hereby vested in the United States District Court for the Western District of New York. App. at 139a.

Clearly Congress anticipated, and therefor provided for a constitutional challenge to the Settlement Act. Nonetheless, the courts below determined they were powerless to adjudicate the validity of this statute. This result destroys the supremacy of the United States Constitution. U.S. Const. Art. VI, cl. 2. If an Act of Congress is unconstitutional, it should not matter which affected party brings that to the court's attention nor should any affected person be required to conform to an unconstitutional law because the party who benefits by the Act (an Indian Tribe) is content with it.

Every statute at issue deeply affects lessees' property interests in the homes and businesses which they and their ancestors have occupied and improved for more than a century. It is manifestly unjust and uniquely destructive of the supremacy clause, judicial review, and due process that non-Indians are *barred* by Indian sovereign immunity and the indispensible party doctrine of Fed. R. Civ. P. 19, from seeking judicial review and construction of Acts of Congress intimately related to their property interests.

B. There Is A Direct Conflict Among The Circuits.

The Second Circuit concluded that Fed. R. Civ. P. 19(b), in conjunction with the doctrine of Indian Sovereignty, totally deprives non-Indian litigants of judicial process: "The lack of a forum does not automatically prevent dismissal of the claims asserted [citations omitted]. 'Sovereign immunity may leave a party with no forum for [that party's] claims.' " *Fluent, supra*, 928 F.2d at 547. App. at 12a. The Tenth Circuit has held to the contrary. *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F. 2d 682 (10th Cir. 1980) *cert. den.* 449 U.S. 1118, *reh. den.* 450 U.S. 960 (1981). In *Dry Creek Lodge* the Court held:

> The plaintiffs alleged that their personal and property rights under the Constitution had been violated by the defendants. A jury so found and awarded damages. There must exist a remedy for parties in the position of the plaintiffs to have the dispute resolved in an orderly manner. *To hold that they have access to no court is to hold that they have constitutional rights but have no remedy.*

Dry Creek Lodge, supra, 623 F.2d at 5 U.S. at 685 (emphasis added). *See also, Marbury, supra*, 5 U.S. at 163: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

In *Dry Creek Lodge*, non-Indian plaintiffs owned and operated a lodge in Indian territory. They sued two Indian Nations in federal court over access to the lodge. The District Court dismissed plaintiffs' claims pursuant to *Santa Clara Pueblo* on grounds of Indian sovereign immunity. The Court of Appeals for the Tenth Circuit reversed. It held that since no forum then would be available to the plaintiffs: "The restrictions present in *Santa Clara Pueblo* should not be applied. There has to be a forum where the dispute can be settled." *Dry Creek Lodge, supra*, 623 F.2d at 685. The Court held that "... the reasons for the limitations [on jurisdiction] and the references to tribal immunity also disappear when the issue relates to a matter outside of internal tribal affairs and when it concerns an issue with a non-Indian." *Id.*

That is fully consistent with this Court's decision in *Montana v. United States*:

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe* ... These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations.*

Montana, supra, 450 U.S. at 564 (citations omitted) (emphasis in original). *See also, Oneida Indian Nation, supra*, 414 U.S. at 667-668. Chief Justice Rehnquist suggested that the absence of a tribal forum for civil claims involving non-Indians meant that a federal forum was available: "More particularly, when they invoke the jurisdiction of a federal court under §1331, they must contend that federal law has curtailed the powers of the Tribe, *and thus afforded them the basis for the relief they seek in a federal forum.*" *Nat. Farmers Union, supra*, 471 U.S. at 852 (emphasis added).

Although *Dry Creek Lodge* has been narrowly construed by the Tenth Circuit, it remains undisturbed. It applies precisely to the factual scenario of the case at bar. The Second Circuit's decision herein cannot be reconciled with *Dry Creek Lodge*. That conflict is intolerable because of the fundamental nature of the rights at stake.[12]

C. The Courts Below Violated Cannons Of Construction Requiring Careful Scrutiny Of The Legislative History Of Indian Statutes.

Both the District Court and the Second Circuit refused to consider the legislative history of the Acts of 1875 and 1890:

> *** [O]nce plaintiffs have to start relying on the legislative history of the Act in making their argument for waiver of the SNI's sovereign immunity, the battle is lost. Congress' intentions to waive the tribe's sovereign immunity must be "unequivocally expressed" by the "plain meaning" of the language in the statute, or else there is no waiver (Dec. of District Court, App. at 59a.)
>
> Regarding the Appellants' contention that the legislative history supports their position that Congress intended to provide a forum for all lease disputes, the need to resort to legislative history similarly highlights the deficiency of the Appellants' position. "If Congress' intention is 'unmistakably clear in the language of the statute,' recourse to

[12] The Second Circuit's decision also creates a conflict within the Circuit. In *John v. City of Salamanca*, 845 F.2d 37 (CA2) *cert. den.* 488 U.S. 850, 102 L. Ed. 2d 106, 109 S. Ct. 133 (1988), the Court of Appeals declared:

> We conclude that Congress limited the sovereignty of the Seneca Nation over the reservation land within the City of Salamanca. The plain language of the 1875 Act supports this conclusion.

John, supra, 845 F.2d at 42. The Second Circuit's decision in the case at bar totally ignores *John*.

> legislative history will be unnecessary; if Congress' intention is not unmistakably clear, recourse to legislative history will be futile." *Fluent, supra,* 928 F.2d at 546; App. at 9a.

Both Courts relied on *Santa Clara Pueblo* to support their refusal to look beyond the language in the statutes to find waiver of sovereign immunity. The decisions impose an impossible prescience on last century's legislators. Effectively, the courts below held the 43rd and 51st Congresses to a standard advanced a century later which apparently requires some specific (although unstated) incantation to achieve waiver.

Courts, "are not free to say to Congress: 'we see what you are driving at, but you have not said it, and therefore we shall go on as before.' " *Rosebud Sioux Tribes v. Kneip,* 430 U.S. 584, 597 (1976), *quoting* Mr. Justice (then judge) Holmes in *Johnson v. United States,* 163 F. 30, 32 (CA1 1908). This Court has repeatedly found that legislative history is a *necessary guide* to construction of ancient Indian statutes. Legislative history *must* be considered to properly construe those statutes:

> "Indian law" draws principally upon the treaties drawn and executed by the Executive Branch and legislation passed by Congress. These instruments which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of common notions of the day and the assumptions of those who drafted them.

Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). *See also,* Cohen, *supra:*

> The requirements for how such a "clear and plain" expression of intent must be demonstrated are not definitively articulated in the cases. Although a few cases have required that an intention to modify treaty rights must be stated in the language of the statute, the weight of authority indicates that such

> an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute.

Cohen, at 223 and *Rosebud Sioux Tribe, supra*, 430 U.S. at 586 ("In determining whether or not the 1889 Reservation boundaries were subsequently diminished by Congressional enactments, we are guided by well-established legal principles. The underlying premise is that congressional intent will control.").

This Court has repeatedly refused to strangle Congressional Acts concerning Indian lands by the constrained construction endorsed below. In *DeCoteau v. District County Court*, 420 U.S. 425 (1975), this Court judicially enforced an agreement authorized by federal statute whereby an Indian Tribe ceded Reservation land to the United States terminating that Reservation. The *DeCoteau* Court closely considered the historical background of the statutes, contemporaneous societal attitudes, the Congressional debates and relevant House and Senate documents. Notably, the majority emphasized that the statute at issue was passed at a time when the U.S. government had altered its policy toward Indian Tribes: "After 1871, the tribes were no longer regarded as sovereign nations, and the government began to regulate their affairs through statute or through contractual agreements ratified by statute." *Id.* at 432. In that same period the Act of 1875 was debated and enacted.

Courts are not free to ignore agreements authorized by Congress because of judicial disagreement with Congressional policy. As this Court held in *DeCoteau:*

> But we cannot rewrite the 1889 Agreement and the 1891 Statute. For the court to reinstate the *entire* reservation, on the theory that retention of mere allotments was ill-advised, would carry us well beyond the rule by which legal ambiguities are resolved to the benefit of the Indians. We give this

> rule the broadest possible scope, but it remains at base a canon for construing the complex treaties, statutes, and contracts which define the status of Indian tribes. A canon of construction is not a license to disregard clear expressions of tribal and congressional intent. *Id.* at 447 (emphasis in original).

In *Rosebud Sioux Tribe,* the Court relied on legislative history to establish congressional intent to diminish, by allotment, the boundaries of an Indian reservation. *Rosebud Sioux Tribe, supra,* 430 U.S. at 584. Although the Allotment Act at issue was contrary to Indian policy at the time of decision, the Court concluded that it was required to decide the case in accord with congressional intent as it was when the Act was passed. *Id.* at 587, citing *Mattz v. Arnett,* 412 U.S. 481, 505 (1973). Further, this Court held that the judiciary could not question that intent nor Congress' motives because "... Congress possessed full power in the matter." *Rosebud Sioux Tribe, supra,* 450 U.S. at 594.

Clearly, the Court did not require some specific magic words in the express terms of the statute to satisfy the requirement that the diminishment of reservation lands be clearly intended by Congress. The Court refused to disturb the justifiable expectations created by the Acts of Congress at issue. *Id.* at 606. Chief Justice Rehnquist declared:

> The intent of Congress in the 1904, the 1907, and the 1910 Acts was to change the boundaries of the original 1889 Rosebud Reservation. Much has changed since then, and if Congress had it to do over again it might well have chosen a different course. But, as we observed in *DeCoteau v. District County Court,* 420 U.S. at 449: "[O]ur task here is a narrow one . . . [W]e cannot remake history."

Id. at 615. *See also, DeCoteau, supra,* 420 U.S. at 449; *Cohen, supra* at 283 and *Cherokee Tobacco v. United States,* 78 U.S. (11 Wall) 616 (1871).

The lower Courts' refusal to consider legislative history, other than in a cursory fasion in dicta,[12] and the findings necessary to the conclusions below, establish the rule of law in the Second Circuit that legislative history *may not be considered* to determine if the Acts of 1875 and 1890 or, indeed, other Indian statutes, waive Indian sovereign immunity. That clearly conflicts with this Court's pronouncements concerning the importance of legislative history to the court's task of construing such legislation.

D. The United States, Lessees And The Seneca Nation Have Relied On The Renewal Clauses In The Acts Of 1875 And 1890 And The Leases Granted Pursuant To Those Statutes.

For more than a century the lessees, the Seneca Nation, and the United States have conducted themselves in all respects as if bound by the provisions of the Acts of 1875 and 1890. The leases granted pursuant to those Acts have been repeatedly enforced by the Seneca Nation against the lessees in the Federal Courts. Congress has itself acted in reliance on the renewal provisions in the Acts of 1875 and 1890 and the 99-year leases.[13]

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[12] In dicta, the Court focused on a single comment by Senator Ingalls to conclude: "[W]e think the legislative history clearly demonstrates that Congress never intended to waive the immunity of the Nation." *Fluent, supra*, 542 F.2d at 546; App. at 9a-10a. In fact Senator Ingalls' comments in full clearly reveal his purpose to create property interests enforceable in a federal forum. *See infra* at Point E.

[13] Because of the pending expiration of the 99-year leases, Congress enacted special legislation to permit HUD to insure mortgages in the City and Villages. Regulations promulgated by the Secretary provide:

"A mortgage on a leasehold estate covering a one to four-family residence located on the Allegany Reservation ... is eligible for insurance if the mortgage meets the requirements of this subpart. ... This section applies only to a mortgage which: Is on a leasehold under a lease with a termination date in February 1991, which

(Footnote continued on following page.)

In *The Seneca People,* by George H.J. Abrams, an enrolled member of the Seneca Nation and an historian and instructor of courses in American Indian History, the author writes:

> Two separate pieces of congressional legislation were signed into law on September 30, 1890. One sold the remaining Kansas lands of the New York Indians. The second provided for a 99-year lease, beginning in 1892 when the leases were to expire, *and an additional renewal period of another 99-years.*

Abrams, *The Seneca People,* Indian Tribal Series/Phoenix (1976) (Library of Congress Catalogue No. 76-19827) (emphasis added).

The language of the Acts of 1875 and 1890 and the leases is very clear concerning the right of renewal possessed by the lessees,[14] However extravagant or pretentious the right of renewal for an additional 99-year term may appear, it arises by principles of law asserted by Congress in the first instance and sustained by practice for more than a century. It is like the situation discussed by Chief Justice John Marshall in *Johnson v. McIntosh*:

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provides for renewal in accordance with the Acts of February 19, 1875 (19 Stat. 330) and the Act of September 30, 1890 (26 Stat. 558)." 24 CFR, ch. 11, §203.43j(a)(2). *See also,* 12 U.S.C. §1709(q). In fact, Congress stated that a mortgagor's failure to take steps to renew his or her lease was "an event of default under the mortgage." 24 CFR §203.43j(b)(2).

[14] Whether the Acts and leases create a renewal right is a question going to the merits which was not decided by the District Court and not at issue on Appeal. Nonetheless, the Second Circuit, in dicta, stated the Acts of 1875 and 1890 did not afford lessees a renewal right. App. at 10a. Lessees submit that the Second Circuit's *dicta* on this point is in error. The leases signed two years *after* the Act of 1890 contain clear renewal clauses which incorporate the Acts of 1875 and 1890. Even the leases unilaterally drafted by the Nation after the *Forness* decision contain such renewal clauses.

> However extravagant the pretention of converting the discovery of an inhabited country into conquest may appear, if a principal has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned ... However this restriction may be opposed to natural right, and to the usages of civilized nations, yet, if it be indispensable to that system under which the country has been settled, and be adapted to the actual condition of the two people, it may, perhaps, be supported by reason, and certainly cannot be rejected by Courts of Justice.

Johnson v. McIntosh, supra, 8 U.S. at 591-592.

E. The Decisions Below Are Wrong On The Merits.

1. Language of the Statutes and Leases.

The Act of 1875 provides at section seven:

> Section 7. That the courts of the State of New York within and for the County of Cattaraugus, having jurisdiction in real actions, *and the circuit and district courts of the United States in and for the Northern District of said state, shall have jurisdiction* of all actions for the recovery of rents and *for the recovery of possession of any real property within the limits of said villages,* whether actions of debt, ejectment, *or other forms of action,* according to the practice in said court; and actions of forcible entry and detainer, or of unlawful detainer arising in said villages, may be maintained in any of the courts of said county which have jurisdiction of such actions. App. at 121a-122a (emphasis added).

On its face, this creates jurisdiction in the District Court for the Northern District of New York (subsequently transferred to the Western District when that District was created) over all claims regarding the

possession of the leased property regardless of the form of action that claim may take. It does not specify by whom nor against whom such claims will be made. It is not limited by its terms to the lessor or the lessee and does not specify which shall be in the position of plaintiff and which in the position of defendant.

The term "possession" as used in section 7, should be related to the use of the term "possession" in section 3 which provides: "... the persons who may be at such time the owner or owners of improvements erected upon such lands, shall be entitled to such renewed leases, and to continue in *possession* of such lands." App. at 119a. Thus, Section 3 clearly contemplates that lessees have a right to *possession* upon renewal. Count One dismissed below seeks prospective, injunctive relief declaring lessee's right to continued *possession* as provided in the Act of 1875.

Since section 3 clearly creates a right to *possession* in the lessee, it makes no sense at all to confine the same word used in section 7 to the Seneca Nation only. The language of the statute does not require nor justify that result. Rather, the Courts below *implied* a limitation into section 7 restricting it exclusively to actions for *possession* by the Seneca Nation only. In addition to the language in the statute, the leases include clear statements showing that both the Nation and the lessees might have claims for *possession*.[15]

[15] Throughout the lease offered by the Nation after the *Forness* decision, reference is made to the District Court and agreements by the parties to be bound by decisions of the District Court. If a lessee is in default, the lease provides that SNI may re-enter and *possess* the property. It provides for an "action to recover the property." App. at 459a-461a, ¶7. However, within six months after *possession* is awarded to the Lessor, the Lessee may tender rent, the costs of the action and interest and regain the property. The lease provides: "Within 3 months after making the payment or tender, if *possession* has not been delivered, the person who made it or his representative,

(Footnote continued on following page.)

2. History of the Act of 1875.

Senator Ingalls identified the need for legislation confirming the leases:

> I will state to the Senator what the need is. It is because the State of New York, through her tribunals, has determined that legislative action heretofore had by that state attempting to confirm and ratify these leases was invalid from the fact that Congress alone has jurisdiction over Indian affairs.

43rd Congress, Cong. Rec. (1875) at 910 [167a]. (All references to the Cong. Rec. are to the page numbers in the Cong. Rec. followed by the Appendix page number in brackets). Mr. Ingalls continued: "[A]ll that is asked of Congress is to declare that those contracts . . . are valid, *and to provide further for a forum in which differences upon this subject may be litigated and adjudicated.*" *Id.* [168a] (emphasis added). He continued: "[T]here is no attempt whatever to deprive these Indians of their rights, either as a tribe or as individuals, but simply to enable these contracts to be held, ratified and confirmed as binding upon the parties who voluntarily made them. *I should like to inquire if there is any law that would render a contract binding upon a white man and at the same time declare the Indian at liberty to violate it whenever he pleased.*" (emphasis added). *Id.* Mr. Ingalls' comments are especially persuasive since he was a member of the Committee on Indian Affairs which reported the bill to

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may *appeal to the court* for an order that *possession* of the property be delivered to him." *Id.* at ¶7(e). The judge of the W.D.N.Y. is empowered to appoint a 3rd arbitrator in cases where the parties cannot agree on a tax value to be used in connection with accelerated rent provisions. App. at 456a-457a, ¶2. The "District Judge aforesaid" shall approve "adequate security" prior to entry by the Lessor on the leased land to remove timber, explore for gas, minerals, etc. App. at 459a, ¶5.

the Senate. He noted: "[*A*]*s the law now stands, when these difficulties arise, there is no forum where these questions can be adjudicated.* Therefore, these men * * * are entirely at the mercy or caprice of the Indians or of white men who many desire to obtain the property heretofore held by other lessees. . . ." *Id.* [169a-170a] (emphasis added).

That is the harm which the Act of 1875 was designed to remedy, and that is the situation which the Act of 1875, and specifically Sections three and seven thereof, corrected. The Senator from Iowa, Mr. Allison, declared that the Act: "[s]imply authorizes the people who have gone on there [the Allegany Reservation] under a mistaken notion of the law to have all the improvements they have made there confirmed by the action of Congress, so far as it has authority to ratify them; *and whatever questions of dispute may arise, either under this law or any provision made between the Indians and these settlers, shall be adjudicated in the United States Courts.*" Cong. Rec. at 913 [187a-188a]. Mr. Allison continued that "both parties are remedyless unless there is some authority conferred by act of Congress." *Id.* [189a].

Senator Morrill of Maine, also a member of the Committee on Indian Affairs that reported the bill to Congress, stated: "Now what does this bill propose to do? *This bill proposes simply to step in and say that these leases are valid and may be maintained in the courts.*" Cong. Rec. at 916 [204a] (emphasis added).

Senator Hager who argued *against* the Act of 1875 acknowledged that the Act would confer jurisdiction over the Nation with respect to lease questions: ". . . [*Y*]*ou impose upon them* [*Indians*] *these burdens, that they must necessarily go into the courts of justice with their lawyers, with their witnesses, and be subjected to all the expense that may be necessary to protect their rights if this bill shall go into operation.*" Cong. Rec. at 918 [219a] (emphasis added).

In addition to the Congressional debates, there are numerous House and Senate documents contemporaneous with the legislature's consideration of the Act of 1875. House Report No. 478 is a report from the Committee on Indian Affairs. App. at 296a-308a. The Committee found that the Nation freely leased the land to the settlers. App. at 298a. It noted:

> *The Indians do not desire that these villages should be removed or broken up, or that these leases should be canceled,* but on the other hand, they profess to be willing to carry out all their leases according to their terms; and if they object to a law confirming them, or authorizing new ones to be made, it is because, being simple in their ideas of individual property, *they do not appreciate the importance which a white man attaches to having his contract not only legal but capable of being enforced by law.* App. at 300a (emphasis added).

The Committee concluded:

> *Under this state of the case* [*declared invalidity of the leases*], the residents in these villages have no remedy whatever against wrong-doers and trespassers. They can neither collect rents nor expel delinquent tenants. They are, moreover, exposed to the danger of being removed, with entire loss of their property, whenever any designing person shall incite the Indians to demand a strict enforcement of their treaty-rights.
>
> Their only dependence now is in the well-known and long-acknowledged high sense of honor of the Seneca Indians.
>
> *The Committee feel that such a state of things ought not longer to be permitted to exist, and that it is just and right that Congress should ratify and confirm the free and voluntary contracts of their Indian wards, made in good faith and for a sufficient consideration. *** They think it just and safe to give them power to lease their lands if they chose, and, having done so, the law should give validity to their acts.* App. at 300a-301a (emphasis added).

Attached to the Committee Report were petitions and remonstrances that were filed with the Committee. A petition by the officers and members of the National Council of the Seneca Nation of Indians objected to any Act which would alienate the land and give it to the settlers in Salamanca and the Villages. App. at 305a-308a. Indeed, Congress several times proposed to do that but was thwarted because it could not extinguish the Ogden Land Company's title.

A Protest was filed on June 3, 1874 by the President, Councilors and People of the Seneca Nation. *See* Senate Misc. Doc. No. 122, App. at 311a-313a. That reveals that the Seneca Nation objected to the Act of 1875 insofar as it ratified leases granted by *individual* members of the Nation. The Nation wanted only leases granted by the Seneca Nation through its Council to be validated and not those granted by individual Nation members. App. at 312a-313a.[16]

Finally, the Seneca Nation protested the jurisdictional grant in the Act:

> *That such an act would compel Indians to go into the courts of the United States, or of the State of New York,* to obtain possession of their lands if a white man disputed it, *as those tribunals would have sole jurisdiction to try all questions of right to your petitioners' land.* App. at 313a (emphasis added).

Thus, even the Seneca Nation, through its Council, understood that the meaning and import of the Act of 1875 was to confer jurisdiction on the federal court to hear and determine claims concerning the possession of the leased premises and to: "try all questions of right to your petitioners' land." *Id.*

[16] *See also,* Senate Misc. Doc. No. 71, a Memorial of the Indians of Cattaraugus and Allegany Reservations dated February 3, 1874. App. at 317a-319a. That Memorial makes it clear that the Seneca Nation objected to confirmation of leases granted by individual Indians and not to confirmation of leases granted by the Nation through its Councilors.

CONCLUSION

The decisions below establish dangerous precedent that Congressional Acts affecting citizens' fundamental rights may be immunized from judicial review if they also concern Indian affairs. The decisions below are uniquely destructive of judicial review and lessees' fundamental, constitutional right to have access to the Courts of the United States to declare, enforce and adjudicate federal statutes. An intolerable conflict exists between the Tenth and Second Circuits concerning a non-Indian's right of access to a forum. Additionally, the method of construction of Indian Statutes endorsed below is totally contrary to that required by this Court's decisions. Finally, the decisions below wrongly interpreted the Acts at issue. For all these reasons Petitioners ask this Court to allow these important issues to be fully briefed and argued by granting their Petition for a Writ of Certiorari.

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Respectfully submitted,

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